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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 479

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner

v.

SIGNAL OIL & GAS COMPANY, et al., *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of The Signal Oil And Gas Company, The Louisiana Land & Exploration Company, Exchange Oil & Gas Company, Amerada Petroleum Corporation, The Preston Oil Company, Forest Oil Corporation, Dorn & Miller, And Texas Gas Exploration Corporation

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INDEX

	Page
Opinions Below	1
Questions Presented	2
Statement of the Case	2
Argument in Opposition to Granting Writ of Certiorari	5
Conclusion	12
Certificate of Service	12

LIST OF AUTHORITIES

CASES

	Page
Beadle v. Spencer, 298 U.S. 124, 131, 56 S.Ct. 712, 715, 80 L.Ed. 1082	9
D'Agosta v. Royal Netherlands SS. Co., (C.A. 2, 1962) 301 F.2d 105, 107	11
Dery v. Wyer, (C.A. 2, 1959) 265 F.2d 804, 810	11
Eugene F. Moran, The, 212 U.S. 466, 29 S.Ct. 339, 53 L.Ed. 600	5, 7
Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318	5, 9
John G. Stevens, The, (1898), 170 U.S. 113, 42 L.Ed. 969	5
Palmyra, The, 12 Wheat. 1, 14	9
Ryan Co. v. Pan Atlantic Corp. (1956), 350 U.S. 124, 100 L.Ed. 133, 76 Sup. Ct. 232	6, 11
Shenker v. United States, (C.A. 2, 1963) 322 F.2d 622, 628	11
United States v. Seckinger, ___U.S.___, 90 S.Ct. 888	2, 6, 10
Weyerhauser S.S. Co. v. Nacirema Co., (Sup. Ct., 1958) 355 U.S. 563, 569, 2 L.Ed.2d 491, 495, 788 S.Ct. 438	11

PETITIONER'S CASES

	Page
Gomes v. Brodhurst, (C.A. 3, 1968) 394 F.2d 465	8
Moragne v. State Marine Lines, Inc. (June 15, 1970), 38 Law Week 4498	7

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SIGNAL OIL & GAS COMPANY, et al., *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, SIGNAL OIL & GAS COMPANY, et al., in opposition to the Petition of OCEAN DRILLING & EXPLORATION COMPANY for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit herein would show:

Opinions Below

The Opinion of the United States District Court for the Eastern District of Louisiana is reported at 294 F.2d 1025.

The Opinion of the United States Court of Appeals for the Fifth Circuit in this cause is reported at 424 F.2d 684.

Questions Presented

Properly stated, the questions presented are:

1. Whether liability of a vessel "in rem" and of a joint tort feasor in personam is joint and several, or is based on comparative negligence.

2. Whether liability in admiralty of joint tort feasors is joint and several under traditional principles, or is based upon comparative negligence.

3. Whether there is a right of contribution in admiralty as between joint tort feasors, and if so, whether the amount of contribution should be based on an equal division of damages, or should be apportioned on the basis of comparative negligence.

4. Whether the holding of this Court in *United States v. Seckinger*, ____U.S.____, 90 S.Ct. 888, requires the application of rules of comparative negligence herein.

Statement Of The Case

This action was filed by Transcontinental Gas Pipe Line Corporation (Transco) in rem, against the drilling barge "Mr. Charlie" to recover damages sustained, when the vessel was submerged in such a manner that it came in contact with a Transco pipe line in Block 106 of the Eugene Island Area in the Gulf of Mexico. Ocean Drilling & Exploration Company (Odeco) filed a claim as owner of the "Mr. Charlie", and also filed third-party claims against Signal Oil and Gas Company (Signal), The Louisiana Land & Exploration Company, Exchange Oil & Gas Company, Amerada Petroleum Corporation, The Preston Oil Company, Forest Oil Corporation, Dorn & Miller, and Texas Gas Exploration Corporation.

An Operating Agreement (Odeco Ex. 10, R. 973) was made between the third-party Defendants under which each of the third-party Defendants as co-lessees had a joint interest in the lease and in the well to be drilled. Signal was the operator for the co-lessees. (R. 54)

On October 29, 1965, Odeco entered into a Contract with Signal (Signal Ex. 4, Odeco Ex. 2, R. 1002) pursuant to which Odeco as an independent contractor agreed to drill a well at a designated drilling location.

On or about January 8, 1966, the Odeco drilling barge "Mr. Charlie", being operated and controlled by Odeco's barge mover, Steve Vorencamp, was moved onto the drilling location and submerged in such a position that it came to rest on and across Transco's 20-inch pipe line.

The existence and location of the pipe line was reflected on numerous maps, charts, and drawings which were on file with (among other agencies) the United States Department of Interior, the United States Army Corps of Engineers, and the Louisiana Department of Conservation. Information as to the exact location of the line was readily accessible and available from these sources as well as from Transco. (R. 1044) Additionally, many small scale maps available to the general public showed the general location of the pipe line. (R. 837, 413) The District Court so found, (R. 1046) as did the Court of Appeals.

The District Court held that Signal was negligent in planning, in that in selecting the well location it failed to check for the existence of pipe lines, and that such negligence was a proximate cause of Transco's damage. (R. 1053) The District Court further held that Vorencamp, the Odeco barge mover, was negligent in failing to make an adequate check regarding the existence or location of Transco's pipe line, that the presumption of

negligence on the part of the moving vessel, "Mr. Charlie", arising from the collision with a fixed object, the pipe line, had been validly sustained, (R. 1054) and that such negligence on the part of the "Mr. Charlie" contributed to cause the damage. (R. 1055)

The District Court, however, erroneously applied the major-minor fault doctrine to give Odeco as the claimant-owner of the "Mr. Charlie" a full right of recovery over and against Signal and construed the indemnity and other provisions of the Drilling and Rework Contract (Odeco Ex. 2, Signal Ex. 4) to deny indemnity to Signal against Odeco under the provisions of the Drilling Contract.

Both Signal and Odeco appealed to the United States Court of Appeals for the Fifth Circuit. That Court in its Opinion which is sought to be reviewed herein held:

1. "That both Signal and Odeco were negligent and that the negligence of each party was a direct and proximate cause of the injuries to Transco's pipe line is clear to us from the facts in this record."

2. That the major-minor fault doctrine is inapplicable to this case.

3. That Respondent, Signal, is not entitled to indemnity under the provisions of its contract with Petitioner, Odeco.

4. That Petitioner, Odeco, has no right of indemnity from Respondent, Signal, based upon implied warranty.

5. That tort indemnity on principles of active and passive negligence is inapplicable because both Signal and Odeco had a primary duty to innocent third parties like Transco, that both breached that duty, and that Signal and Odeco each was guilty of acts or omissions which proximately caused the injury complained of.

6. Affirmed the trial court holding that the drilling barge "Mr. Charlie" in rem, and the third-party Defendant Signal in personam are jointly and severally liable to Transco for their concurrent negligence.

Argument In Opposition To Granting Writ Of Certiorari

Under the judgment of the Court of Appeals, Odeco, as owner of the vessel, in rem, and Signal in personam are jointly and severally liable to Transco for the damage done to its pipe line proximately caused by their concurrent major fault.

To reach the result contended for herein by Petitioner, this Court would have to either hold that the negligent tort feasors were liable to Transco only for the proportionate share of the damage caused by their individual negligence, or hold that there is a right to contribution among joint tort feasors in admiralty with the amount of compensation to be relatively apportioned in accordance with the degree of fault. To sustain the contention that liability to Transco is based on comparative fault, the Court would have to set aside basic legal principles as to liability of a vessel in rem, including the decision in *The John G. Stevens* (1898), 170 U.S. 113, 42 L.Ed. 969. To sustain the contention that liability as between Odeco and Signal is to be based on comparative fault, the Court would have to overrule its decision in *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 that no right of contribution exists in admiralty between joint tort feasors.[1]

1. The court, of course, recognized that the divided damages rule would apply where *two vessels collided due to the fault of both*. The apportionment under the divided damages rule is as between vessels rather than as between parties. *The Eugene F. Moran*, 212 U.S. 466, 29 S.Ct. 339, 53 L.Ed. 600. Here only one vessel was at fault.

Alternatively, the Court would have to greatly expand the scope of its holdings in *United States v. Seckinger*, (1970) 90 S.Ct. 88, ____U.S.____, and *Ryan Co. v. Pan Atlantic Corp.*, (1956) 350 U.S. 124, 100 L.Ed. 133, to give Petitioner a right of indemnity upon implied warranty based on comparative fault.

The issue of whether rules of comparative fault are applicable in this case was not raised by Petitioner until the Motion for Rehearing was filed in the Court of Appeals. The contention was rejected by denial of the Motion, but was not otherwise briefed or argued in the courts below.

The Court of Appeals held that it was clear from the facts in the record that both Signal and Odeco were negligent, and that the negligence of each party was a direct and proximate cause of the injury to Transco's pipe line. It was thus held that the finding of the District Court that the negligence of the barge was minor was clearly erroneous. The Court of Appeals' Opinion conclusively shows that the facts do not make this a case of disproportionate negligence in which equal distribution of liability would be inequitable.

There was ample evidence of negligence of Odeco. As reflected by the Court of Appeals' Opinion, Petitioner's Director of Safety testified that Odeco's drilling barges had previously set down on at least a dozen pipe lines, that it was incumbent on the barge mover to find out whether there was a pipe line in the area, and that he should look at a map before putting the barge on a drilling location. The barge mover testified that he did not look at any maps although he had maps on board reflecting the location of the pipe line, and had personal knowledge that the line ran through Block 106. He blindly set his barge

down on the pipe line without knowing where he was in relation to the pipe line, or where the drilling location was within Block 106, notwithstanding that he had the means at hand to make his own independent inquiry.

As was correctly pointed out by the Court of Appeals, this case does not involve a collision between vessels guilty of mutual fault. Consequently the facts do not make applicable the divided damages rule, or its corollary, the major-minor fault doctrine. Under the divided damages rule, damages are divided equally between the vessels at fault, not apportioned as between parties. *The Eugene F. Moran*, 212 U.S. 466, 29 S.Ct. 339, 53 L.Ed. 600. Here the only offending vessel is that of Petitioner. No basis exists for applying the rule. The "Mr. Charlie" is liable in rem for Transco's total damages.

What Petitioner seeks herein is the pronouncement of a new rule of admiralty law by this Court to the effect that liability of all tort feasors is to be based upon comparative negligence. The decision of the Court of Appeals for the Fifth Circuit, involves no conflict of decisions. The decision below turns upon its own facts, and unless this Court now desires to announce sweeping new rules of admiralty law regarding the application of principles of comparative negligence, the decision will affect few, if any, persons other than the litigants.

The recent decision of this Court in *Moragne v. State Marine Lines, Inc.*, (June 15, 1970) 38 Law Week 4498, cited by Petitioner, wherein the Court overruled *The Harrisburg*, 119 U.S. 199, and held that an action does lie under general maritime law for death caused by violation of maritime duties, has no pertinence to the instant case. The very citation of this case by Petitioner makes it clear that it is endeavoring to persuade the Court

to change the law concerning liability of joint tort feasors in admiralty, and is not seriously contending that the Court of Appeals failed to properly apply existing principles of law to the facts.

The case of *Gomes v. Brodhurst* (C.A. 3, 1968), 394 F.2d 465, cited by Petitioner, is not in point not only because it is a non-maritime case, but also because it does not involve division of damages as between joint tort feasors. In that case, one negligent party had settled with the plaintiff. The issue was as to how the amount of damages *recoverable by the plaintiff* from the non-settling tort feasor should be determined. The court held that limiting of the liability of the non-settling tort feasor to the extent of its negligence, and no further, was the more equitable rule. The additional recovery by the plaintiff was reduced to this amount.

The case is not authority for the proposition that the liability of each tort feasor to the plaintiff would have been limited to its proportionate share of the negligence had the case been tried on the merits as to all parties.

For principles of comparative fault to apply in the instant case, the Court would necessarily have to hold either that the liability in rem of Odeco to Transco for the damage caused by its negligent navigation of the "Mr. Charlie" was limited to Odeco's proportionate share of the fault, or alternatively, the Court would necessarily have to hold that there is a right of contribution in admiralty as between joint tort feasors under which the amount of the contribution of each is to be relatively apportioned in accordance with the degree of fault.

The damage herein was caused by Petitioner's vessel striking the Transco pipe line. From the early days of

our admiralty law, the offending vessel has been considered as the best and surest pledge for the compensation and indemnity of the injured party. *The Pulmyra*, 12 Wheat. 1, 14. A maritime lien upon the vessel for damages caused by her fault arose as soon as the damage was sustained enforceable by Transco in rem against the offending vessel. *The John G. Stephens*, 170 U.S. 113, 123; 42 L.Ed. 969. We cannot believe that this Court would now seriously consider changing basic precepts of admiralty actions in rem by holding that Petitioner, as claimant-owner of the vessel, is not liable to Transco for the full amount of the damages to its pipe line.

Thus, the issue narrows to whether Petitioner has a right of recovery over against Signal. Such a right could be nothing more or less than a right of contribution as between joint tort feasors in admiralty. This Court by its decision in *Halcyon Lines v. Haenn Ship Corp.* (1952) 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 expressly held that since Congress has not approved such a rule of contribution in admiralty between joint tort feasors, it would be inappropriate for the Court to do so. Thus, to sustain Petitioner's contention, the Court would now have to overrule *Halcyon Lines, supra*, and to hold that there was a right of contribution in admiralty, with the right of contribution being based not on an equal division of damages, but relatively apportioned in accordance with the degree of fault of the negligent parties. We respectfully submit that the Court should adhere to its prior holding in *Halcyon Lines, supra.*[2]

2. Cases involving proportional mitigation of damages for contributory negligence in suits brought under the Jones Act, 46 U.S.C. 388, are not applicable because that Act adopts the provisions of the Employers' Liability Act, 45 U.S.C. 53. See *Beadle v. Spencer*, 298 U.S. 124, 131, 56 S.Ct. 712, 715, 80 L.Ed. 1082.

The holding in *United States v. Seckinger*, (1970) 90 S.Ct. 888, does not require the application of rules of comparative negligence herein. In that case, this Court was called upon to construe a specific indemnity provision in a standard contract between the United States and a contractor. The contract provided that the private contractor "shall be responsible for all damages to persons or property that occur as a result of his fault or negligence . . ."

After the contractor's employee had obtained a judgment against the Government under the Tort Claims Act, the Government sued the contractor under the indemnity clause contained in the written contract claiming that the contractor was required to indemnify the Government if both the United States and the contractor were jointly negligent.

Interpreting the contract provisions so as to arrive at the intent of the parties, the Court concluded that the most reasonable construction of the clause was that liability would be premised on the basis of comparative negligence. However, the Court in *Seckinger* was not addressing itself either to the question of liability of joint tort feasors in admiralty or to common law liability of tort feasors in the absence of a written indemnity contract. The Court, in fact by footnote at 90 S.Ct.Rep. 886, recognized the traditional principles of joint and several liability of tort feasors stating:

> "In the absence of workmen's compensation statutes, the employer and the third party tort feasor would be jointly and severally liable, under traditional principles, for the injuries produced."

Petitioner does not contend that rules of comparative negligence should be applied herein based on the express

provisions of the written contract.[3] Petitioner urges that the Court ignore the express contract provisions relating to indemnification of Signal and grant Odeco indemnity based on implied contract.

Petitioner, Odeco, has no right of indemnity based upon implied warranty. Petitioner, Odeco, was performing the drilling operation for Signal under a written drilling and rework contract containing specific indemnity provisions. The existence of the express provisions of the written contract makes inapplicable principles of indemnity based upon implied warranty. *Shenker v. United States*, (C.A. 2, 1963) 322 F.2d 622, 628; *D'Agosta v. Royal Netherlands SS. Co.*, (C.A. 2, 1962) 301 F.2d 105, 107; *Dery v. Wyer*, (C.A. 2, 1959) 265 F.2d 804, 810.

Compare, *Weyerhauser S.S. Co. v. Nacirema Co.*, (Sup. Ct., 1958) 355 U.S. 563, 569, 2 L.Ed.2d 491, 495, 78 S.Ct. 438.

Ryan Co. v. Pan Atlantic Corp., (1956) 350 U.S. 124, 100 L.Ed. 133, 76 Sup. Ct. 232, permits a ship owner who owes the warranty of seaworthiness to those employed on the vessel to have indemnity from the stevedore for breach of implied warranty of workmanlike performance.

As pointed out by the Court of Appeals, the *Ryan* doctrine is closely tied to the obligation a ship owner owes to those employed on the vessel.

The situation herein where Odeco owned and operated its own vessel as an independent contractor and damaged

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3. It was not likely the intention of the parties that the contract provision requiring Petitioner, Odeco, "to protect Company (Signal) against liability for damage, loss or expense arising from damage to property or injuries or death of any person or persons arising in any way out of, in connection with, or resulting from the work provided for hereunder . . ." was intended to reduce Odeco's potential liability.

Transco in the performance of a written contract with Signal is not at all analogous to *Ryan, supra.* Petitioner, Odeco, not Respondent, Signal, was performing the work under the contract and had the obligation to do so in a good and workmanlike manner. No right of indemnity based upon implied warranty should be accorded Odeco herein.

CONCLUSION

For the reasons above stated, the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit herein should be denied.

Respectfully submitted,

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Certificate Of Service

I hereby certify that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been served on counsel for Petitioner and counsel for Transcontinental Gas Pipe Line Corporation by depositing the same in the United States mail, first class, postage prepaid, on this ____ day of August, 1970.